Kredin Sdn Bhd v Development & Commercial Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-304-94
SHAIK DAUD, SITI NORMA YAAKOB AND ABU MANSOR JJCA
10 JULY 1995

Companies *— Winding up — Commencement — Petition filed but winding-up order not made — Creditor registered prohibitory order over company's land in execution of judgment — Whether prohibitory order void — Whether winding up commences on date of winding-up petition or date of order — Doctrine of relation back — Companies Act 1965 ss 219(2) & 224*

On 14 August 1987, Bank Bumiputra Malaysia Bhd filed a petition to wind up the appellant company ('Kredin') in the High Court. However, up until the date of this judgment the winding-up petition was still pending hearing. On 23 January 1988, the respondent bank ('D & C') sued Kredin on a loan agreement in the High Court and judgment was entered against it. In order to execute this judgment, D & C registered a prohibitory order on a few parcels of land belonging to the Kredin on 31 March 1992 and also applied for a writ of seizure and sale of the land in the High Court ('the execution proceedings'). Following the execution proceedings, Kredin made applications, inter alia, to set aside the prohibitory order on the ground that it was void under s 224 of the Companies Act 1965 ('the Act'), as it was filed after the commencement of the winding up under s 219(2) of the Act. The application was, however, dismissed on the ground that the prohibitory order could only be rendered void after a winding-up order had been made under s 224 and since a winding-up order may ultimately not be made, the execution was not void. [See [1995] 1 MLJ 441.] Kredin has appealed to the Court of Appeal. The issue before the court is the interpretation to be given to s 219(2) of the Act, and its practical effect when read together with s 224.

Held, allowing the appeal:

(1) (Per **Siti Norma Yaakob JCA**) Section 224 of the Act provides that any attachment, sequestration, distress or execution put in force against the estate or effects of a company after the commencement of the winding up by the court shall be void. Pursuant to s 219(2), a compulsory winding-up is deemed to commence at the time when the winding-up petition is presented.

(2) The intention of Parliament in enacting ss 219(2) and 224 of the Act is to ensure that no creditors, particularly the unsecured creditors, who execute their claims against the company would be enriched at the expense of other unsecured creditors, between

A the date when the winding-up petition is presented and when the winding-up order is made by the court ('the interim period').

(3) It follows that the execution which was put in force during the interim period was void, and the fact that a winding-up order may not ultimately be made was irrelevant. However, in the B event that a winding-up order is made, it will relate back to the date when the winding-up petition was presented, under the doctrine of relation back.

[Bahasa Malaysia summary

C Pada 14 Ogos 1987, Bank Bumiputra Malaysia Bhd telah memfailkan suatu petisyen untuk menggulungkan syarikat perayu ('Kredin') di Mahkamah Tinggi. Walau bagaimanapun, sehingga tarikh penghakiman ini, petisyen penggulungan itu masih belum dibicara. Pada 23 Januari 1988, bank penentang ('D & C') telah mendakwa Kredin atas suatu perjanjian pinjaman di Mahkamah Tinggi, dan D penghakiman telah dicatatkan terhadapnya. Untuk melaksanakan penghakiman tersebut, D & C telah mendaftarkan perintah larangan ke atas beberapa bidang tanah kepunyaan Kredin pada 31 Mac 1992 dan juga telah memohon untuk suatu writ penyitaan dan penjualan tanah itu di Mahkamah Tinggi ('prosiding pelaksanaan'). Ekoran E prosiding pelaksanaan ini, Kredin telah membuat permohonan, antara lain, untuk mengenepikan perintah larangan tersebut atas alasan bahawa ia adalah terbatal di bawah s 224 Akta Syarikat 1965 ('Akta tersebut'), oleh kerana ia telah difailkan selepas permulaan penggulungan di bawah s 219(2) Akta tersebut. Walau bagaimanapun, permohonan itu telah ditolak atas alasan bahawa perintah larangan F tersebut hanya akan menjadi terbatal selepas perintah penggulungan telah dibuat di bawah s 224 dan oleh kerana suatu perintah penggulungan mungkin tidak akan dibuat pada akhirnya, pelaksanaan itu tidak terbatal. [Lihat [1995] 1 MLJ 441.] Kredin telah merayu kepada Mahkamah Rayuan. Isu yang perlu dibicarakan oleh G mahkamah ialah apakah pentafsiran yang patut diberikan kepada s 219(2) Akta tersebut dan kesan praktisnya apabila dibaca bersama dengan s 224.

Diputuskan, membenarkan rayuan itu:

H (1) (Oleh **Siti Norma Yaakob HMR**) Seksyen 224 Akta tersebut menyatakan bahawa sebarang penahanan, sekuestrasi, distres atau pelaksanaan yang dikuatkuasakan terhadap estet atau barang kepunyaan sesuatu syarikat selepas penggulungan dimulakan oleh mahkamah adalah terbatal. Menurut s 219(2), penggulungan wajib adalah dianggap sebagai bermula apabila petisyen I penggulungan dikemukakan.

(2) Niat Parlimen dalam menggubal ss 219(2) dan 224 Akta tersebut ialah untuk memastikan supaya tidak ada pemiutang, terutamanya pemiutang tak bercagar, yang melaksanakan tuntutan mereka

terhadap syarikat itu yang akan diperkayakan sehingga menjejaskan kedudukan pemiutang tak bercagar yang lain, di antara tarikh apabila petisyen penggulungan dikemukakan dan apabila perintah penggulungan dibuat oleh mahkamah ('tempoh interim').

(3) Lantaran itu, sebarang pelaksanaan yang dikuatkuasakan semasa tempoh interim itu adalah terbatal, dan hakikat bahawa sesuatu perintah penggulungan mungkin tidak akan dibuat pada akhirnya adalah tidak relevan. Walau bagaimanapun, jika suatu perintah penggulungan dibuat, ia akan berhubung balik kepada tarikh apabila petisyen penggulungan itu dikemukakan di bawah doktrin hubungan balik (relation back).]

[*Editorial Note*: The respondent has filed an application for leave to appeal to the Federal Court vide Civil Application No 08–52–1995.]

Notes

For cases on winding up of companies, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Motor Terms Co Ltd v Liberty Insurance Ltd (1967) 116 CLR 177 (refd)

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Anor [1992] 1 MLJ 571 (folld)

Legislation referred to

Companies Act 1965 ss 219(2), 224
Rules of the High Court 1980 O 18 r 19
Companies Act 1961 s 223(2) [NSW]

KS Narayanan (*Dennis Xavier* with him) (*Jayaraman, Ong & Co*) for the appellant.

NV Nadkarni (*Lee Hishammuddin*) for the respondent.

Cur Adv Vult

Shaik Daud JCA: I have had the opportunity of reading the draft judgment of my sister, Siti Norma Yaakob JCA, in this matter with which I concur.

Siti Norma Yaakob JCA: The only matter in issue in this appeal is the interpretation to be given to s 219(2) of the Companies Act 1965 ('the Act') and its practical effect when read together with s 224 of the same Act. This issue is further compounded by the fact that there are now in existence two conflicting decisions of the High Court based on facts that are somewhat similar.

Section 219 fixes the commencement of a winding up by the court in voluntary and compulsory winding-up petitions and in the case of the latter, s 219(2) deems such commencement to be at the time the winding-up petition is presented. For ease of reference, I reproduce s 219(2) as follows, 'In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.'

Section 224, on the other hand, is concerned with the avoidance of certain attachments etc, after the commencement of a winding up and in substance, it reads as follows:

> Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up by the Court shall be void.

The undisputed facts leading to this appeal are as follows. On 14 August 1987, Bank Bumiputra Malaysia Bhd ('BBMB') who is not a party in these proceedings, filed a petition to wind up the appellant ('Kredin') in Kuala Lumpur High Court Winding-up Petition No 02–42–375–87. Two and a half years later, on 19 February 1990, upon the withdrawal of BBMB, Overseas-Chinese Banking Corp was substituted as the petitioner but up to date, the petition against Kredin is still pending.

On 23 January 1988, after the commencement of the winding-up petition by BBMB, the respondent bank sued Kredin on a loan agreement dated 29 October 1982, in Kuala Lumpur High Court Civil Suit No D2–23–215–88 ('the civil suit'). Kredin filed its statement of defence on 29 April 1988, but it was set aside on 14 April 1989, following an application by the respondent bank under the provisions of O 18 r 19 of the Rules of the High Court 1980, and judgment for RM33,935,372.36, together with interest and costs, was entered against Kredin.

It was to execute this judgment that the respondent bank registered a prohibitory order on five parcels of land belonging to Kredin on 31 March 1992, and in Kuala Lumpur High Court Application for Execution No 36–9–92 ('the execution file'), the respondent bank applied for a writ of seizure and sale against Kredin. It was following these execution proceedings that Kredin:

(1) filed an application dated 3 June 1992 in the civil suit, to have the judgment dated 14 April 1989 set aside;

(2) filed an application to stay all proceedings in the execution file; and

(3) filed an application to set aside the prohibitory order in the execution file.

All three applications were heard by VC George J (as he then was) who dismissed all the applications with costs, but it is in respect of one particular application that we are now concerned with, namely, the application by Kredin to have the prohibitory order set aside on the ground that it is void under s 224 of the Act, as it was filed after the commencement of the petition for winding up under s 219(2) of the Act. VC George J (as he then

was) found otherwise, and whilst acknowledging that s 219(2) creates a statutory fiction, giving rise to a contingent future possible winding up, the fact that no winding-up order has been made does not render the prohibitory order void. It can only be rendered void after a winding-up order had been made. The learned judge also considered the possibility that the petition might ultimately be withdrawn or dismissed, and it is this possibility that further strengthens his reasoning that putting into force an execution after presentation of a petition does not render such execution null and void under s 224.

This decision runs contrary to another earlier decision reached by Lim Beng Choon J in the case of *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Anor* [1992] 1 MLJ 571. Pembinaan KSY had obtained two money judgments against Lian Seng on 31 March 1987, and 17 November 1988. To execute these judgments, Pembinaan KSY obtained two prohibitory orders on 26 October 1989, against lands belonging to Lian Seng, as well as two writs of seizure and sale over the same lands. At the same time, Pembinaan KSY had also presented a petition for winding up against Lian Seng.

In proceedings to set aside an interlocutory injunction obtained ex parte, one of the objections taken by Lian Seng was that the prohibitory orders on which Pembinaan KSY's sole cause of action arose were void as they infringed s 224 read with s 219(2) of the Act.

After considering the purpose of s 224, the deeming provisions of s 219(2) and the principles of construction of a statute, Lim Beng Choon J concluded that Pembinaan KSY had no right to obtain the two prohibitory orders as it had already presented a winding-up petition against Lian Seng. On that finding, the learned judge held the two prohibitory orders to be null and void under s 224. This decision was appealed against and although the then Supreme Court dismissed the appeal, we do not have the benefit of a written judgment to ascertain the reasons for the dismissal of the appeal or whether the issue on the interpretation of s 219(2) read together with s 224 were canvassed at all. Hence, the burden lies upon us to determine which of the two conflicting decisions represent the true intention and purpose of Parliament when it enacted ss 219(2) and 224 of the Act.

That purpose and intent were considered by the High Court of Australia in the case of *Motor Terms Co Ltd v Liberty Insurance Ltd* (1967) 116 CLR 177, when the court was interpreting the provisions of s 223(2) of the Australian Companies Act 1961 (NSW), which is equivalent to our s 219(2). Barwick CJ had this to say:

> The date of the presentation of the petition on which the order is made is set by the Companies Act [s 223(2)] as the date of commencement of the liquidation, that is to say, as the date of the commencement of the process of administering the assets of the company with a view to their proper distribution according to the statute amongst the creditors. That date to my mind is both the logical and the practical date, as well as being the date chosen by the legislature, as at which to determine who are the creditors and as at which to adjust their rights.

A Thus, s 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the order for winding up is made. During that period, the law sees to it that the B assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors. Section 224 preserves the assets and effects of the company, and it is to safeguard this underlying principle that there is this notion of a relation back that once a winding-up order is made, it relates back to the date of C the presentation of the winding up, ie the date when the winding up is deemed to have commenced. It follows that all attachments, sequestration, distress or execution put in force against the estate or effects of a company made within the interval of the presentation to wind up and the date when the order to wind up is made by the court, are void. The fact that no winding-up order will ultimately be made makes no difference to this D finding, as s 219 is not concerned whether a winding-up order will ultimately be ordered or not, but that in mandatory tones it provides protection to unsecured creditors once a winding up is deemed to have commenced, that is upon the presentation of the petition. Thus, to say that protection is only present as and when the winding-up order is eventually made is to E go against the very intention of what Parliament had enacted. That protection arises once a winding up commences and the date of the commencement is nothing more than a question of fact ascertained from the date of the presentation of the winding up. For that reason, we consider that the decision reached in *Pembinaan KSY*'s case has been rightly made as opposed to the one in this appeal before us. We, therefore, F allow this appeal with costs here and below and [order] that the deposit be refunded to the appellant.

G **Abu Mansor JCA**: I have had the opportunity of reading the draft judgment of my sister, Siti Norma Yaakob JCA, in this matter with which I concur.

Appeal allowed.

Reported by Isabel Liong

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